

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ERNEST MERRILL, et al.,) 1:05-cv-00195-AWI-SMS
Plaintiffs,)
v.) ORDER DENYING PLAINTIFFS' MOTION
) TO CONSOLIDATE ACTIONS AS MOOT
) (DOC. 18)
)
COUNTY OF MADERA, et al.,) ORDER DENYING PLAINTIFFS' MOTION
Defendants.) TO JOIN PARTIES, PERMIT A
) SUPPLEMENTAL PLEADING ALLEGING A
) COUNTERCLAIM, IMPEAD THIRD
) PARTIES, AND FOR MANDATORY
) JOINDER (DOCS. 18, 34)
)
COUNTY OF MADERA,)
Counter-Claimant,)
v.) ORDER GRANTING IN PART THE
) PARTIES' REQUESTS THAT THE COURT
) TAKE JUDICIAL NOTICE OF DOCUMENTS
ERNEST MERRILL, et al.,) FILED IN REMANDED ACTION NO.
) 1:05-CV-00559-AWI-SMS
Counter-Defendants.)
)
)

I. Background

On September 9, 2005, Plaintiffs Ernest and Lila Merrill filed their first amended complaint, in which they sued the County of Madera, two employees thereof (Basch, a code enforcement officer, and Meyers, who issues permits), and Gary Gilbert, a member of the County Board of Supervisors, alleging that the County and its agents gave inconsistent advice regarding, and required when the law really did not require,

1 permits to grade a road on their property which is the only
2 practical access to their property; denied a road permit in June
3 2002 and thereafter; wrongly cited Plaintiff for grading a road
4 without a permit; instigated a criminal prosecution in July 2002
5 for grading without a permit, which developed into a prosecution
6 for Fish and Game Code violations regarding which Plaintiff
7 Ernest Merrill is on probation; delayed a building permit in
8 August 2002; refused permits for a deck and barn; issued in
9 October 2003 and then revoked or failed to renew in March 2004
10 grading permits for the road; and thereby precipitated conflict
11 between Plaintiffs and third parties Schub and Gillette, who
12 purchased some of Plaintiffs' property on which the road is
13 situated, who gave Plaintiffs an easement over the road, and who
14 are parties to a contract with Plaintiffs which requires
15 Plaintiffs to maintain and grade the road.

16 The claims stated in the complaint against Defendant County,
17 which are constitutional claims over which there is federal
18 question jurisdiction, include denial of access to a public
19 building, denial of due process (failure of Defendant County to
20 provide reasons and a hearing as requested by Plaintiffs with
21 respect to the denials of their various requests for permits),
22 denial of equal protection (unequal treatment of Plaintiffs with
23 respect to permits, prosecution, bond requirements, and waiver
24 thereof), and impairment of the obligations of contract
25 (contracts between Plaintiffs and Schub and Gillette as well as
26 others). Plaintiffs seek \$100,000,000.00 in damages for the loss
27 of the money that they spent on grading the road that has washed
28 out or will wash out because it cannot be completed, damage to

1 and loss of the barn, loss of a contract for, or income from,
2 grazing cows on the land prevented by the absence of the
3 functioning barn, and loss of potential income or value of
4 subdividing their land.

5 Defendants answered the complaint on September 20, 2005,
6 denying the essential allegations of the complaint, and asserting
7 affirmative defenses of lack of standing (Plaintiffs' no longer
8 own the property that is the subject of the action), lack of
9 ripeness and exhaustion of state remedies, absolute or qualified
10 immunity, and unclean hands.

11 Defendant County filed a counterclaim against Plaintiffs,
12 various business entities owned and/or operated by them, and
13 third parties also owning part of Plaintiffs' ranches or property
14 situated adjacent thereto, and most recently amended
15 counterclaims on September 26, 2005, asserting claims alleged to
16 arise from the same events and occurrences and same case or
17 controversy (Fed. R. Civ. P. 13(a)), including nuisance and
18 violation of County codes (unlawful and substandard road grading
19 and building activities and subsequent unlawful sales of land to
20 third parties), public nuisance (damage to slopes and banks,
21 tributaries and streams, and trees from road grading and other
22 activities, affecting neighboring properties), violation of
23 subdivision regulations (lack of required parcel maps), and
24 declaratory relief (regarding the applicability of the County
25 codes, and whether the codes have been violated).

26 In a state court action that was removed to this Court
27 (Schub v. Merrill, 1:05-cv-00559), Schub and Gillette, the
28 purchasers and present owners of part of the land over which the

1 road passes, sued the Merrills, Plaintiffs in this action,
2 stating the following claims: (1) Breach of Easement Agreement
3 (failure to comply with terms of a written easement by engaging
4 in unlawful, wrongful and dangerous grading of a road being built
5 on Plaintiffs' property, improper use of the easement, and
6 leaving debris); (2) Specific Performance; (3) Preliminary and
7 Permanent Injunction; (4) Abatement of Nuisance (caused by the
8 aforementioned conduct and by failing to comply with governmental
9 regulations, which in turn caused the County of Madera to "red
10 tag" the property and thereby to prevent Plaintiffs from using
11 the roadway to serve their own property and from developing their
12 own property); (5) Trespass; (6) Declaratory Relief (regarding
13 the scope of the easement); (7) Termination of Easement (for use
14 exceeding its scope) ; (8) Negligence (breach of duty created by
15 regulations and law promulgated by Madera County, California
16 Department of Fish and Game, and other governmental agencies);
17 and (9) Fraud (misrepresentation by Defendants at the time of
18 purchase regarding Plaintiffs' property being buildable, gated,
19 fenced, and secure). This action was remanded to state Court on
20 September 1, 2005. Schub and Gillette assert¹ that they are
21 seeking an injunction in that action.

22 Plaintiffs assert that the conduct of Defendant County has
23 prevented it from complying with its duty to third parties Schub
24 and Gillette to maintain and grade the easement road. Plaintiffs
25 quote a letter sent to them in April 2004 in which third parties
26 Schub/Gillette stated that they were refused by Defendant County

27
28 ¹No evidentiary materials, such as declarations, have been submitted by either party in connection with the present motion.

1 permits to grade and place a construction trailer on the Schub
2 property because of ongoing code violations (on what or whose
3 property it is not clear). Plaintiffs also assert that Schub and
4 Gillette have since decided not to let Plaintiffs use the
5 easement and have refused access to Plaintiffs' contractors and
6 to anyone who seeks to use the easement which Plaintiffs claim
7 they have over the property now owned by Schub and Gillette.
8 (Motion filed May 25, 2005, at 3.)

9 II. The Instant Motions

10 On May 25, 2005, Plaintiffs filed notice of a motion to
11 consolidate this action with the action that has been remanded to
12 state court; this motion is thus moot and will be denied.

13 Concurrently Plaintiffs filed a motion to join third parties
14 Schub/Gillette in the present case, to allow a supplemental
15 pleading pursuant to Fed. R. Civ. P. 13(e), 13(a), and 14 to
16 implead and allege a counterclaim against them in connection with
17 their refusal to permit anyone to use the easement which
18 Plaintiffs allege they own; they also seek to ensure that Schub
19 and Gillette, as third party plaintiffs (Mot. at 4) who have been
20 denied permits for their own development by the County are
21 indemnified against loss and do not suffer from issue preclusion
22 or claim preclusion. They assert that this will conserve judicial
23 resources.

24 Third parties Schub and Gillette filed opposition on June
25 27, 2005 (at a time at which they were plaintiffs in a suit
26 pending in this Court), in which they requested judicial notice
27 be taken of the papers filed in connection with the motion to
28 remand in 05-cv-00559 (the motion that was granted, and the case

1 that is no longer pending in this Court).

2 Third parties also objected that there was no admissible
3 evidence of the factual matters argued in Plaintiff's motion, in
4 violation of Local Rule 78-230(b), which provides that the moving
5 party shall file affidavits, if appropriate.

6 Finally, third parties noted that it is unclear in what
7 capacity they are to be joined--whether as plaintiffs or
8 defendants--and whether any such option makes sense. No complaint
9 in impleader has been filed or proposed, so it is impossible to
10 determine the exact nature of claims that Plaintiffs are
11 asserting against third party defendants.

12 Plaintiffs filed a supplement to its motion to join on
13 September 22, 2005, in which they sought mandatory joinder
14 pursuant to Fed. R. Civ. P. 19.

15 Third parties filed a supplemental opposition on October 11,
16 2005, continuing their objections to the lack of declarations or
17 admissible evidence supporting the factual allegations in the
18 motion, and contesting the propriety of mandatory joinder.

19 Defendant County has filed neither opposition nor notice of
20 non-opposition.

21 By separate order the Court has vacated the hearing of this
22 matter set for November 4, 2005, and has deemed the matter
23 submitted on the papers previously filed with the Court.

24 III. Analysis

25 In shotgun fashion, Plaintiffs have referred to several
26 possible basis for joinder or filing pleadings. Plaintiffs have
27 failed to submit a proposed pleading setting forth the precise
28 claim or claims they wish to include in this action; thus, the

1 basis of Plaintiffs' motion is unclear. Nevertheless, to the
2 extent intelligible, the requests set forth by Plaintiffs will
3 analyzed.

4 A. Impleader pursuant to Fed. R. Civ. P. 14

5 Plaintiffs here seek to ensure that Schub and Gillette, as
6 third party plaintiffs (Mot. at 4) are indemnified against loss
7 and do not suffer from issue preclusion or claim preclusion;
8 further, Plaintiffs seek to conserve judicial resources.

9 Fed. R. Civ. P. 14 provides:

10 At any time after the commencement of the action
11 a defending party, as a third party plaintiff, may
12 cause a summons and complaint to be served upon a
13 person not a party to the action who is or may be
14 liable to the third party plaintiff for all or part of the
15 plaintiff's claim against the third party plaintiff.

14 Fed. R. Civ. P. 14(b) provides:

15 When a counterclaim is asserted against a plaintiff,
16 the plaintiff may cause a third party to be brought in
17 under circumstances which under this rule would
18 entitle a defendant to do so.

17 Impleader is available to a plaintiff where a counterclaim has
18 been filed against the plaintiff and where the person or entity
19 to be joined is or may be liable to the plaintiff on account of
20 the counterclaim. Fed. R. Civ. P. 14 (a), (b); see Atchison,
21 Topeka & Santa Fe Railway Co. v. Hercules, Inc., 146 F.3d 1071,
22 1074 (9th Cir. 1998). Impleader is designed to bring in a third
23 party who is or may be liable to the impleading party for all or
24 part of the plaintiff's (here counterclaimant County's) claim
25 against the impleading party. The purpose of this rule is to
26 promote judicial efficiency by eliminating the necessity for the
27 defendant (here a plaintiff) to bring a separate action against a
28 third individual who may be secondarily or derivatively liable to

1 the defendant (here a plaintiff) for all or part of the original
2 claim against the impleading party. It is a matter within the
3 sound discretion of the Court. Southwest Administrators, Inc. v.
4 Rozay's Transfer, 791 F.2d 769, 777 (9th Cir. 1986).

5 Here, there is no basis for a finding that Schub/Gillette
6 are liable to Plaintiffs/Counter-defendants for all or part of
7 the claim that the County has against Plaintiffs/Counter-
8 defendants. The County has alleged that Plaintiffs violated codes
9 and regulations. Schub/Gillette are not named in the
10 counterclaim. It is possible that by refusing to allow Counter-
11 defendants Merrills to use the easement, Schub/Gillette are
12 precluding the Merrills' bringing the road into compliance (now,
13 as distinct from in the past), but there is no evidence (as
14 distinct from mere factual assertions and quotation of a what is
15 asserted to be a letter received from Schub/Gillette from the
16 Merrills) in support of such an assertion. However,
17 Plaintiffs/Counter-defendants Merrills are not arguing that;
18 rather, they are seeking to protect Schub/Gillette from
19 adjudications regarding those violations.

20 There is no evidentiary showing supporting a finding that
21 Schub/Gillette are purchasers who, as alleged in the first amended
22 counterclaim (at 5), in January 2005 purchased their property as
23 part of a fraudulent marketing scheme by the Merrills; further,
24 the complaint in action number 05-00559, of which this Court
25 takes judicial notice,² indicates (at 3) that the date of the

26
27 ²The Court may take judicial notice of court records. Fed. R. Evid. 201(b); United States v. Bernal-Obeso,
28 989 F.2d 331, 333 (9th Cir. 1993); Valerio v. Boise Cascade Corp., 80 F.R.D. 626, 635 n. 1 (N.D. Cal. 1978), aff'd,
645 F.2d 699 (9th Cir. 1981). The Court takes judicial notice of documents filed in action number 05-00559-AWI-
SMS to the extent those matters are referred to in this order.

Schub/Merrill purchase of property from Plaintiffs was February 7, 2003, and not January 2005, the time referenced in the counterclaim (at 5). There is no basis for secondary or derivative liability on the part of Schub/Gillette to the County for Plaintiffs' conduct, which is the basis for impleader. See, United States v. One 1977 Mercedes Benz, 708 F.2d 444, 452 (9th Cir. 1983).

Finally, the moving parties have not submitted any pleading that would permit the Court to ascertain definitely how Schub/Gillette should participate in this action.

Accordingly, the Court exercises its discretion to deny the request to implead Schub/Merrill pursuant to Rule 14.

B. Mandatory Joinder pursuant to Fed. R. Civ. P. 13(a)

Plaintiffs assert, in their motion filed when the Schub/Gillette action was pending in this Court, that the facts that give rise to the Schub/Gillette's (now state) action against them arise out of the same transaction or occurrence as that in their action here (namely, the County's mistreatment of Plaintiffs), and thus mandatory joinder is appropriate; the Defendant County, and not Plaintiffs in this action, are responsible for the harm that third parties Schub/Merrill have suffered and continue to be responsible for continuing harm because Defendant County has refused, and conspired to refuse, permits.

Fed. R. Civ. P. 13(a) provides:

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of

1 serving the pleading the pleader has against any
2 opposing party, if it arises out of the transaction or
3 occurrence that is the subject matter of the opposing
4 party's claim and does not require for its adjudication
5 the presence of third parties of whom the court cannot
6 acquire jurisdiction. But the pleader need not state
7 the claim if (1) at the time the action was commenced
the claim was the subject of another pending action, or
(2) the opposing party brought suit upon the claim by
attachment or other process by which the court did not
acquire jurisdiction to render a personal judgment on
that claim, and the pleader is not stating any
counterclaim under this Rule 13.

8 Rule 13(a) by its terms applies only to claims that the pleader
9 has against "any opposing party." Schub/Gillette are not opposing
10 parties in this action; although they were parties to the earlier
11 action in this Court, they were not so in any voluntary sense,
12 and that action has not been remanded to state court.

13 Thus, the Court will deny Plaintiffs' request to join
14 Schub/Gillette in this action by way of a counterclaim.

15 C. Permissive Joinder pursuant to Fed. R. Civ. P. 20

16 In their Supplement filed on September 22, 2005, Plaintiffs
17 argued that in this action against Madera, they seek damages for
18 the County's impairment of their contract with third parties
19 Schub and Gillette based on Defendant's unconstitutional actions
20 preventing maintenance of the easement. Plaintiffs argue that
21 Schub/Gillette should be joined permissively as Plaintiffs in
22 this action under Rule 20, to be liberally construed pursuant to
23 League to Save Lake Tahoe v. Tahoe Regional Planning Agency, 558
24 F.2d 914, 917 (9th Cir. 1977), because third parties have been
25 harmed by the County in a way nearly identical to the way in
26 which Plaintiffs have been harmed by the County. However,
27 Plaintiffs acknowledge that these third parties have indicated
28 they are not interested in permissive joinder.

1 Fed. R. Civ. P. 20(a) provides:

2 (a) Permissive Joinder. All persons may join in one
3 action as plaintiffs if they assert any right to relief
4 jointly, severally, or in the alternative in respect of
5 or arising out of the same transaction, occurrence, or
6 series of transactions or occurrences and if any
7 question of law or fact common to all these persons
8 will arise in the action. All persons (and any vessel,
9 cargo or other property subject to admiralty process in
10 rem) may be joined in one action as defendants if there
11 is asserted against them jointly, severally, or in the
12 alternative, any right to relief in respect of or
13 arising out of the same transaction, occurrence, or
14 series of transactions or occurrences and if any
15 question of law or fact common to all defendants will
16 arise in the action. A plaintiff or defendant need not
17 be interested in obtaining or defending against all the
18 relief demanded. Judgment may be given for one or more
19 of the plaintiffs according to their respective rights
20 to relief, and against one or more defendants according
21 to their respective liabilities.

22 Rule 20(a) by its terms refers to permissive joinder; Plaintiffs
23 cite no authority permitting the Court to order or mandate
24 "permissive" joinder. It is undisputed that Schub/Gillette do not
25 desire to join in this action.

26 Accordingly, the Court will deny Plaintiffs' request to
27 order joinder pursuant to Fed. R. Civ. P. 20(a).

28 D. Mandatory Joinder pursuant to Fed. R. Civ. P. 19

Fed. R. Civ. P. 19(a) provides:

1 a) Persons to be Joined if Feasible. A person who
2 is subject to service of process and whose joinder will
3 not deprive the court of jurisdiction over the subject
4 matter of the action shall be joined as a party in the
5 action if (1) in the person's absence complete relief
6 cannot be accorded among those already parties, or (2)
7 the person claims an interest relating to the subject
8 of the action and is so situated that the disposition
9 of the action in the person's absence may (i) as a
10 practical matter impair or impede the person's ability
11 to protect that interest or (ii) leave any of the
12 persons already parties subject to a substantial risk
13 of incurring double, multiple, or otherwise
14 inconsistent obligations by reason of the claimed
15 interest. If the person has not been so joined, the
16 court shall order that the person be made a party. If

1 the person should join as a plaintiff but refuses to do
2 so, the person may be made a defendant, or, in a proper
3 case, an involuntary plaintiff. If the joined party
4 objects to venue and joinder of that party would render
the venue of the action improper, that party shall be
dismissed from the action.

5 By way of brief factual summary, from the pleadings filed in
6 action number 05-00559-AWI-SMS, in state court the third parties
7 are suing Plaintiffs for breach of their contractual duty to
8 maintain the easement and grade the road by engaging in unlawful,
9 wrongful and dangerous grading of the road, as well as abatement
10 of nuisance based in part on failing to comply with governmental
11 regulations, which in turn caused the County of Madera to "red
12 tag" the property and thereby to prevent Plaintiffs from using
13 the roadway to serve their own property and from developing their
14 own property); third parties also allege negligent failure to
15 perform a duty created by regulations and law promulgated by
16 Madera County, California Department of Fish and Game, and other
17 governmental agencies.

18 In this Court, Plaintiffs are suing the government for
19 wrongfully delaying and failing to grant permits to grade the
20 road (and perform other work on his property), citing him for
21 grading without a permit, prosecuting him for continuing to grade
22 without a permit and thereby interfering with Plaintiffs' duty to
23 the third parties (Schub/Gillette, purchasers of the parcel
24 abutting the road over which Plaintiffs retain an easement to use
25 the road to access the remainder of his ranch) pursuant to a
26 contractual obligation to maintain the road by grading and
27 maintaining it, and further impairing Plaintiffs' business
28 relationship with Schub/Gillette, who have in fact sued

1 Plaintiffs. Because of Defendants' wrongful conduct and the
2 resulting inability to grade the road, run-off into streams has
3 occurred, and Merrills were wrongfully and selectively cited for
4 conditions on the property.

5 The County has now countersued, alleging in part that
6 Plaintiffs engaged in development and road construction
7 activities without permits and without compliance with pertinent
8 codes and workmanlike standards, causing environmental damage,
9 and that Plaintiffs further sold in a fraudulent manner parcels
10 to other persons (not third parties here) who have thereby
11 assisted with, or are responsible for, the noncomplying
12 activities on the land. The relief requested by the
13 counterclaiming County includes a determination that Plaintiffs
14 violated the Madera County Codes, engaged in nuisances, and a
15 declaration of the applicability of the County's grading and
16 building regulations.

17 In this regard, Plaintiffs ask the Court to take judicial
18 notice of the counterclaim and assert that there has been
19 sufficient identification of the Doe counterdefendants such that
20 the Schub/Gillete third parties are in fact identified,
21 particularly because parcel number 050-102-006, the parcel owned
22 by Schub/Gillette³, was alleged to be part of Plaintiffs' Dream
23 Catcher Ranch and to have been sold; further, because the
24 purchasers are alleged to have aided and assisted the nuisance on
25 all parts of the ranch, their conduct is in issue, and Plaintiff
26 contends that Plaintiffs cannot obtain complete relief unless
27

28 ³ No evidence is submitted in support of this factual assertion.

1 Schub and Gillette are joined. Plaintiffs assert this is the
2 parcel that Schub/Gillette own. However, as previously noted, the
3 complaint in previous action 05-00559 reveals that Schub/Gillette
4 purchased their parcel well in advance of the January 2005 period
5 specified in Plaintiffs' complaint in this action.

6 Plaintiffs admit that the relief they seek in the federal
7 action is not structured to have a negative impact on the third
8 parties' interests, and that if Plaintiffs obtain judgment in
9 their favor here, it will not negatively impact third parties and
10 will in fact benefit them because it would permit Plaintiffs to
11 maintain the easement; further, a judgment in favor of Madera
12 will not affect any right of the third parties. Plaintiffs
13 assert, however, that third parties' interests will be "more
14 protected" in federal court than in state court as they would
15 still look to Plaintiffs for relief, but the County of Madera
16 would be available for indemnification in this action. Plaintiffs
17 thus appear to admit that Schub/Gillette's ability to protect any
18 interest they have relating to the subject of the action will
19 not, as a practical matter, be impaired or impeded.

20 However, Plaintiffs argue that considering the possibility
21 of a state court judgment in favor of Schub/Gillette, Plaintiffs
22 could be subjected to "multiple judgments that could go different
23 ways." (Supplement at 3.)

24 Rule 19(a)(2)(ii) provides that absent parties must be
25 joined where a judgment rendered in their absence would leave any
26 of the persons already parties subject to a substantial risk of
27 incurring double, multiple or otherwise inconsistent obligations
28 by reason of the absent parties' claimed interest.

1 Plaintiffs argue that they could be subject to multiple,
2 inconsistent judgments if the state court rules in favor of the
3 third parties. "Inconsistent obligations" within the terms of
4 Rule 19 are not, however, the same as inconsistent adjudications
5 or results. Delgado v. Plaza Las Americas, 139 F.3d 1, 3 (1st
6 Cir. 1998); see 4 James Wm. Moore et al., Moore's Federal
7 Practice ¶ 19.03 (3d ed.2005). Inconsistent obligations occur
8 when a party is unable to comply with one court's order without
9 breaching another court's order concerning the same incident.
10 See, 4 Moore's at ¶ 19.03. Inconsistent adjudications or results,
11 by contrast, occur when a defendant successfully defends a claim
12 in one forum, yet loses on another claim arising from the same
13 incident in another forum. Id. Even inconsistent judgments
14 regarding the validity of an obligation are not within the
15 meaning of the rule. Although such a scenario would produce
16 inconsistent judgments or results, it would not impose
17 inconsistent "obligations" because the party subject to the
18 judgments would be subject to only one judgment obligation.
19 Because Rule 19(a)(2) speaks in terms of inconsistent
20 "obligations" and not inconsistent "results," clause (a)(2) of
21 Rule 19 does not apply to these circumstances. Natl. Union Fire
22 Ins. Co. v. Mass. Mutual Wholesale Electric Co. 117 F.R.D. 321,
23 322-23 (D. Mass. 1987). Further, where two suits arising from the
24 same incident involve different causes of action, defendants are
25 not faced with the potential for double liability because
26 separate suits have different consequences and different measures
27 of damages. 139 F.3d at 3.

28 Here, with respect to the issues in the federal case of

1 whether or not the Madera codes were applicable or were violated
2 (raised in both the first amended complaint and the
3 counterclaim), the federal action could result in a finding that
4 the codes applied and that Plaintiffs violated them, and
5 Plaintiff could be ordered to abate the nuisances and pay fines
6 and costs. It is possible that in the state court action, it
7 could be determined that Plaintiffs here (Merrills, the
8 defendants in state court) had not violated the codes. However,
9 even though there might be inconsistent results, Plaintiffs would
10 be subject to only one judgment and would not be put in the
11 position of not being able to comply with inconsistent
12 judgments.⁴ With respect to affording complete relief among
13 the parties already joined, Eldredge v. Carpenters 46 N. Cal.
14 Counties Joint Apprenticeship and Training Committee, 662 F.2d
15 534, 537 (9th Cir. 1981), there is no risk of inconsistent
16 declaratory judgments such that any relief that could be granted
17 in this case would be rendered inadequate absent joinder. This
18 is because the declaratory judgment sought by Schub/Gillette in
19 the state action goes only to the scope of the easement, not to
20 whether or not codes applied or were violated.

21 The Court concludes that in light of the above analysis, and
22 given the uncertainty of Plaintiffs' motion, Plaintiffs' motion
23 will be denied in its entirety.

24 Accordingly, it IS ORDERED that

25 1) Plaintiffs' motion to consolidate this action with case
26

27 ⁴ The Court notes that to the extent that there might be an inconsistency, Plaintiffs have not suggested that
28 they are unable to protect themselves by either bringing the County into the state action, or by seeking a stay of one
of the actions.

1 number 05-00559-AWI-SMS IS DENIED as moot; and

2 2) Plaintiffs' motion to join third parties Schub and
3 Gillette in the present case, allow a supplemental pleading
4 pursuant to Fed. R. Civ. P. 13(e) and 13(a), implead Schub and
5 Gillette pursuant to Fed. R. Civ. P. 14, allege a counterclaim
6 against third parties, and for mandatory joinder of third parties
7 IS DENIED without prejudice.

8
9 IT IS SO ORDERED.

10 **Dated: November 3, 2005**
11 icido3

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE